Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Teamsters Canada Rail Conference,

applicant,

and

Great Canadian Railtour Company Ltd.; Canadian Pacific Railway Company,

employers.

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December 5, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members.

Counsel of Record

Mr. Ken Stuebing, for the Teamsters Canada Rail Conference;

Mr. Geoffrey J. Litherland, for the Great Canadian Railtour Company Ltd.;

Mr. Ron Hampel, for the Canadian Pacific Railway Company.

These reasons for decision were written by Mr. Robert Monette, Member.

I. Nature of the Application

[1] This is an application filed on August 13, 2013, by the Teamsters Canada Rail Conference (TCRC or the applicant) seeking a declaration of a sale of business pursuant to sections 44 and 45

of the *Canada Labour Code* (*Part I – Industrial Relations*) (the *Code*), from the Canadian Pacific Railway Company (CP) to the Great Canadian Railtour Company Ltd. (GCRC) relating to the crewing and on-track operation of the tourist train "Rocky Mountaineer" (RM Train) for the segment between Kamloops, British Columbia, and Calgary, Alberta.

[2] As an alternative, the applicant seeks a declaration pursuant to section 35 of the *Code* that CP and the GCRC constitute a single employer.

II. Background and Facts

[3] The applicant is a trade union representing numerous railroad employees across the country, notably the running trades employees of CP, including locomotive engineers, conductors, trainmen and yardmen.

[4] The GCRC operates a seasonal tourist train service between British Columbia and Alberta through the Canadian Rockies under the brand name "Rocky Mountaineer." The train travels over four rail routes Eastbound and Westbound: between Vancouver and Calgary via Kamloops; between Vancouver and Jasper via Kamloops; between North Vancouver and Whistler; and between Whistler and Jasper. There is also a recent additional route for a round-trip passenger train service between Vancouver and Seattle.

[5] The GCRC owns the fleet of locomotives and passenger cars and has operated the RM Train since 1990 when it took over the service from VIA Rail Canada Inc. (VIA).

[6] The GCRC does not own any of the rail tracks on which the RM Train operates. It contracts with the Canadian National Railway Company (CN) and with CP for the use of their tracks. Actually, the only CP tracks used by the RM Train are the tracks between Kamloops and Calgary, whereas all other tracks used by the RM Train belong to CN. The GCRC contracts with various suppliers for its catering needs.

[7] The GCRC is a privately owned company with its head office in Vancouver, employing approximately 275 employees, including some 125 on-board hosts who are represented by a trade union, Teamsters Local 31.

[8] From 1990 to 2007, the GCRC contracted with CP and CN to supply the running trades persons needed to operate the RM Train. In 2007, it terminated its crewing contract with CN on a number of its Canadian routes and contracted with CRC Rail Management Services Ltd. (CRC) for its crewing needs on these routes, including the segment between Vancouver and Kamloops.

[9] On October 1, 2012, the GCRC notified CP that it would cease to use its crewing services and contracted with the CRC to provide the crewing services on the route between Kamloops and Calgary. The GCRC ceased to use CP's crewing services with the new season beginning April 1, 2013.

[10] CP is a publicly traded railway transportation company; it owns and maintains the tracks used by the RM Train between Kamloops and Calgary. CP and CN regularly grant running rights on their tracks across the country to each other and to other railroads, such as VIA for example. CP maintains full traffic control on its own tracks and coordinates all running rights thereon with its own schedules and business needs.

[11] In the case of the GCRC, CP has granted it running rights since 1990. CP requires to approve in advance the schedule and frequency of trains using the running rights, such that the GCRC must submit its planned operations schedule to CP as much as 18 months in advance for approval.

[12] CP has provided the GCRC from 1990 to the spring of 2013 with its running trades employees to operate the RM Train on the route segment between Kamloops and Calgary. The assignment of CP's running trades employees to the RM Train of the GCRC has become routine over the years such that, since 1999, its collective agreements with the TCRC contain provisions relative to the assignment of one engineer and one conductor per such train.

[13] From the time when the crewing services were taken over by the CRC effective April 1, 2013, the running trades employees of CP continue to be employed by CP while the running trades persons recruited by the CRC for the Kamloops–Calgary segment are largely made up of former CP employees, familiar with that train route. The CRC running trades employees are not presently unionized.

III. Positions of the Parties

A. The TCRC

[14] The TCRC submits that the route used by the RM Train between Vancouver and Calgary is the original and flagship route of the RM Train, while the other routes were added progressively through the years.

[15] The TCRC argues that the operation of this route is a "business" and that the segment between Kamloops and Calgary is a severable part thereof, which has been transferred from CP to the GCRC, thereby constituting a sale of business as contemplated by section 44(1) of the *Code*.

[16] In the alternative, the TCRC submits that the level of control and direction exercised by CP over its tracks and the scheduled runs of the RM Train, its right to not allow a running trades person to work on its tracks, and the fact that the GCRC necessarily operates on the CP tracks mean that CP and the GCRC constitute a single employer for the purpose of section 35 of the *Code*, and should be declared as such.

[17] The TCRC argues that the requirement for the GCRC to submit for approval by CP its schedule of train runs at least 18 months in advance, as well as the complete traffic control exercised by CP on its tracks, demonstrates that both employers are related and associated and are sharing control and direction of the business, such that a single employer finding and declaration should be made. The TCRC underlines the fact that CP determines when and how frequently the GCRC will be allowed to run its RM Train, by what running trades persons it will be operated, demonstrating thereby the level of control integration and coordination that CP exercises over the RM Train operation.

[18] The applicant does not identify CRC as a party in its application, nor does it identify therein the CRC as an entity involved in these events. It is only in its reply submission that the TCRC acknowledges the existence of CRC and its role in supplying crews to the GCRC since 2007. The TCRC alleges that CRC was incorporated in 2007 for the sole purpose of handling GCRC RM Train operations and that it is merely a dependent contractor of the GCRC.

[19] The TCRC requests that the current CP–TCRC running trades collective agreements be made applicable to the running trades persons now performing their work on the Kamloops–Calgary segment and that the GCRC be bound jointly with CP by these collective agreements.

[20] The TCRC submits that it would be useful to review the contracts that intervened between CP and the GCRC so as to provide more detailed insight into their relationship. The TCRC did not, however, make a request to the Board for a disclosure order, as would be required pursuant to section 21 of the *Canada Industrial Relations Board Regulations, 2012*.

B. CP

[21] CP submits that its running trades crews have been operating the RM Train route portion between Kamloops and Calgary since the GCRC secured the rights from the federal government, in 1990, to operate a tourist train formerly operated by VIA. CP was, until 2012, one of the suppliers of crews to the GCRC. It states that CN supplied crews for the route portion between Vancouver and Kamloops as well as other routes until 2007 when the GCRC ceased to obtain crews from CN and started to rely on CRC as the supplier of crews.

[22] CP submits that when the GCRC served notice in 2012 that it would cease to use CP for the supply of crews starting with the new season in 2013, CP "sold" nothing to the GCRC, that it conveyed no assets, no equipment, no personnel to the GCRC. CP states that it was merely hired by the GCRC to provide crews on the Kamloops–Calgary portion and that, effective April 1, 2013, it ceased to provide crews as the GCRC made other arrangements to secure crews; it sold nothing.

[23] CP responds to the alternative "single employer" position advanced by the applicant by stating that CP's and the GCRC's businesses are neither associated nor related. They are distinct corporations that do not share a common direction.

[24] CP has granted running rights on its tracks to the GCRC since 1990, as it also frequently grants running rights to other railroads, for example CN and VIA. According to CP, running rights are an accepted railway practice that does not and cannot amount to a finding of single employer. CP states that it does not control the affairs of the GCRC (nor vice versa); it merely controls the traffic use and circulation on its own tracks.

[25] Relying on *Kindersley Transport Ltd. and Quilt Transport Ltd.*, 2008 CIRB 409, CP further submits that there is, at any rate, no sound labour relations purpose to be served by a single employer declaration and that the application should therefore be dismissed in its entirety without the need for a hearing.

C. The GCRC

[26] The GCRC states that, between 1990 and 2007, it contracted with CP and CN for its crewing services. In April of 2007, it elected to contract with CRC for the engineering and conducting services on a number of routes previously crewed by CN running trades personnel; it points to the fact that there were no claims of sale and of successor status or of single employer following these actions.

[27] The GCRC states that, currently, CN provides crewing services only for the route between North Vancouver and Whistler and the route between Whistler and Jasper, while all other crewing needs are covered by CRC.

[28] The GCRC states that it contracted with CRC in April of 2013 to recruit and employ running trades crews for the disputed route segment, to supervise and arrange for training attendance, and to ensure the operation of the trains.

[29] Upon termination of the crewing services that until now had been provided by CP, the GCRC submits that there was no transfer of capital, assets, equipment, licences or employees neither to itself or to CRC from CP.

[30] According to the GCRC, the termination of the CP crewing services and the provision of the services by CRC effective April 1, 2013, merely constitute the replacement of one supplying contractor by another, consistently found by the Board and its predecessor, the Canada Labour Relations Board (CLRB), as not constituting a sale of business. In support of its position, the GCRC relies on such decisions as *Terminus Maritime Inc.* (1983), 50 di 178; and 83 CCLC 16,029 (CLRB no. 402); *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; and *Saskatoon Airport Authority*, 2005 CIRB 340.

[31] The GCRC argues that one portion of a rail route such as the one in dispute should not and does not constitute a business, that there is no common control or direction of its business with CP, that they are not associated or related companies or businesses within the meaning of section 35 of the *Code*.

[32] According to the GCRC, the suggestion by the applicant that a situation of single employer arises when a rail company uses tracks that are owned by another rail company is a suggestion that must be dismissed. The GCRC submits that it merely purchases the right to use CP's tracks on the disputed route and that there exists no common decision making nor shared programs or resources between the two companies.

[33] The GCRC submits that CP and itself are not integrated. CP has no control and no say on the business strategy and objectives of the GCRC, no control and no say on its labour relations, policies, planning or strategies. The GCRC relies on various decisions such as *The Canadian Press et al.* (1976), 13 di 39; [1976] 1 Can LRBR 354; and 76 CLLC 16,013 (CLRB no. 60); and *Saskatoon Airport Authority*, *supra*, to support its view that the single employer test has not been demonstrated by the applicant.

[34] The GCRC adds that the CP employees who previously worked the RM Train continue to be employed by CP and continue to be governed by their respective collective agreements, such that there is, at any rate, no valid labour relations purpose to make a single employer declaration.

[35] The GCRC also argues that what it describes as the undue delay taken by the applicant to bring the present application after it was notified, on October 2012, of the cancellation of the CP crewing services should also be a factor in the consideration by the Board of the lack of a valid labour relations purpose for the declaration sought. The GCRC requests that the entire application be dismissed.

IV. Analysis and Decision

[36] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing. Indeed, all counsel are to be commended for their able and helpful submissions.

[37] Ever since the *Terminus Maritime Inc.*, *supra*, plenary decision of 1983, the Board and its predecessor, the CLRB, have consistently held that the cancellation of a supply contract with one supplier and its replacement by another supply contractor does not, normally, constitute a sale of business and does not attract the successor consequences enunciated at section 44 of the *Code*:

> 44.(1) In this section and sections 45 to 47.1,
>
> "business" means any federal work, undertaking or business and any part thereof;
>
> "provincial business" means a work, undertaking or business, or any part of a work, undertaking or business, the labour relations of which are subject to the laws of a province;
>
> "sell", in relation to a business, includes the transfer or other disposition of the business and, for the purposes of this definition, leasing a business is deemed to be selling it.
>
> (2) Where an employer sells a business,
>
> (*a*) a trade union that is the bargaining agent for the employees employed in the business continues to be their bargaining agent;
>
> (*b*) a trade union that made application for certification in respect of any employees employed in the business before the date on which the business is sold may, subject to this Part, be certified by the Board as their bargaining agent;
>
> (*c*) the person to whom the business is sold is bound by any collective agreement that is, on the date on which the business is sold, applicable to the employees employed in the business; and
>
> (*d*) the person to whom the business is sold becomes a party to any proceeding taken under this Part that is pending on the date on which the business was sold and that affects the employees employed in the business or their bargaining agent.

[38] In *GlobeGround North America Inc., doing business as Servisair/GlobeGround*, 2007 CIRB 391 (*GlobeGround*), the Board summarized the applicable law as follows at paragraph 52:

> [52] The successorship provisions of the *Code* have generally not been applied to continue bargaining rights and obligations when a service contract is awarded to another legal entity through a third party. The Board's predecessor, the CLRB, has on numerous occasions stated that successor rights were never intended to apply to genuine circumstances of subcontracting, loss of business or loss of a contract to a competitor or to a corporate dissolution (see *Freight Emergency Service Ltd.* (1984), 55 di 172; and 84 CLLC 16,031 (CLRB no. 460); and *CAFAS Inc.* (1984), 56 di 54; 7 CLRBR (NS) 1; and 84 CLLC 16,034 (CLRB no. 463)). The protection is meant to apply when there is a true transfer or disposition of a "business" as a whole entity rather than of discrete work functions. ...

[39] The Board also stated, at paragraph 55 of *GlobeGround*, *supra*, that the mere continuity of the work activity from one supplier to the next is not sufficient to establish a continuity of a business

and attract a finding of a sale, pursuant to section 44 of the *Code*. It went on to cite with approval the concept enunciated by the Ontario Labour Relations Board in *Metropolitan Parking Inc., supra*, in regard to a successorship application in the context of subcontracting:

> 44. For a transaction to be considered a "sale of business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern." A business is not synonymous with its customers or the work it performs or its employees. ...

[40] Section 47.3 of the *Code* governing successive contracts for services in the pre-board security screening industry is a provision that was added to the *Code* in 1998, which confirms the above-described case law by specifically not applying a sale of business and successorship concept to the replacement of one screening contractor by another.

[41] The applicant has a challenging task in the present circumstances to overcome this heavy trend and establish that a core distinguishing feature of CP's business as a going concern has been passed on to the GCRC and/or the new crewing supplier. In the Board's view, this case does not present compelling facts and factors that distinguish it from the subcontracting context examined in these cases:

> i) CP lost a crewing contract but continues to operate its railroad transportation business as before;
>
> ii) the GCRC continues to operate the RM Train with external supplied crews, albeit from one less supply source, using the same running rights as before;
>
> iii) CRC continues to provide crewing services to the GCRC for the operation of the RM Train, albeit covering one more route segment than it did before the CP contract cancellation.

[42] Based on the evidence, it is the Board's view that CP merely ceased to provide running trades crews to the GCRC without conveying any capital or property or personnel to the GCRC; the running rights used by the GCRC are the same rights it secured from CP ever since 1990. The RM Train is a business that clearly belongs to the GCRC and continues to be operated and managed by the GCRC.

[43] The running trades crewing of the RM Train and the on-track operation of the segment of the rail route between Kamloops and Calgary do not, in the Board's view, constitute a business on their own. The most fundamental components of a business as a going concern are absent, such as: its business strategy and objectives, its financial structure and its management of costs and revenues, its product and brand development, its sales and marketing direction and strategy, its personnel and labour relations objectives and strategy, not to mention its property and equipment management, or its corporate, financial and legal direction and strategy, all of which rested with and continue to rest entirely within the GCRC, before and after it cancelled the CP crewing contract and opted for a different supplier.

[44] A tourist train business such as this one necessarily requires the passenger component, including the pricing strategy, the services to be offered to passengers and the on-board host personnel that offer these services; CP has no involvement in these matters entirely managed by the GCRC. The running trades part of the train is not, therefore, a business on its own and is not severable from the passenger service component of the tourist train.

[45] The Board accordingly finds that the application for a declaration of sale of a business and consequent successor status is not founded and is hereby dismissed.

[46] Turning to the alternative position advanced by the applicant to the effect that CP and the GCRC constitute a single employer, section 35 of the *Code* reads as follows:

> 35.(1) Where, on application by an affected trade union or employer, associated or related federal works, undertakings or businesses are, in the opinion of the Board, operated by two or more employers having common control or direction, the Board may, by order, declare that for all purposes of this Part the employers and the federal works, undertakings and businesses operated by them that are specified in the order are, respectively, a single employer and a single federal work, undertaking or business. Before making such a declaration, the Board must give the affected employers and trade unions the opportunity to make representations.
>
> (2) The Board may, in making a declaration under subsection (1), determine whether the employees affected constitute one or more units appropriate for collective bargaining.

[47] It is conceded by all that the GCRC and CP are both federal undertakings and both employers. The next question to be determined is whether they are "associated or related" and whether they have common control or direction.

[48] The TCRC submits that the exclusive traffic control exercised by CP over its tracks and its contractual right to approve of or disapprove of the RM Train proposed schedule of operations is a significant demonstration of the fact that the GCRC and CP are associated or related and are under common control and direction. According to the TCRC, the running rights conferred by CP to the GCRC are essential to the very existence of the tourist train, at least on the segment between Kamloops and Calgary. The fact that CP may disqualify for safety reasons a running trades person from operating on its tracks is, according to the TCRC, further demonstration of common control and direction of the workforce needed to operate that segment of the RM Train.

[49] The Board, however, does not place the same value on these facts in regard to the application of section 35 of the *Code*. The evidence shows that the two corporations are separate legal entities, do not share ownership of any property, equipment, licences, do not have common directors or managers, and do not have common policies or programs. The only relation that both companies have are the running rights arrangements, still in effect, and the recently cancelled supply arrangement by CP to the GCRC of running trades crews on the disputed route segment between Kamloops and Calgary, a portion only of the many RM Train routes, even if an important one indeed from a tourist attraction perspective.

[50] Based on the evidence, the GCRC alone determines what is the desirable course for its business, such as the number of trains and equipment to use, such as the type of marketing and sales effort to promote its tourist train operations, such as the selection of a supplier of catering services, what services should be offered to passengers, the composition and deployment of the on-board hosts, and the negotiations of their working conditions. CP plays no part in the direction of these matters, all essential components of a tourist train business. When CP is considering the scheduled plan of the GCRC on its tracks, it approves or disapproves the plan, not for the benefit of the GCRC but merely to coordinate safely the planned usage of its tracks with CP's own transportation traffic and the use by other railways such as VIA. In the Board's view, this does not amount to common direction or control, as contemplated by section 35 of the *Code*, nor does it amount to the kind of integration that is required to be "associated or related."

[51] The reserved authority by CP in granting running rights to the GCRC, ever since 1990 was obviously not perceived until now as a demonstration of a single employer situation, as no

application to that effect was ever made until the present one despite the fact that the situation has remained constant over the many intervening years. The traffic control exercised by CP over its tracks is a daily requirement for the safe operation thereon of any traffic and is not designed to interfere with or benefit the GCRC tourist train business.

[52] In the same fashion, the right reserved by CP to disqualify a running trades person from operating equipment on its tracks is only by way of safety-related reasons and does not, in the Board's view, constitute a common workforce management status between CP and the GCRC.

[53] Much like in *Saskatoon Airport Authority*, *supra*, the Board finds that there is no common ownership, no common directors, no common policies or programs, no integration of organizational structures, services, finances and labour relations direction and decisions, such that there is insufficient evidence in the present matter to conclude that the GCRC and CP are associated or related, or to find that they are under common control or direction, all within the meaning of section 35 of the *Code*.

[54] Furthermore, even if all the requisite conditions enunciated at section 35 had been established, which the Board finds they have not, there would remain an additional condition towards securing a single employer declaration, that is, to satisfy the Board that there is a valid labour relations reason for it to exercise its discretion and make such a declaration.

[55] The Board is not satisfied that there is, in the present matter, a valid labour relations reason to make such a declaration, as the CP crews assigned until recently to the RM Train continue to be employed by CP and governed by its current collective agreements, while CP may be successful in the future to secure more crewing contracts from third parties such as the GCRC using CP tracks. The Board finds that current bargaining rights are not undermined by the use of some corporate or commercial structure that might otherwise call for a section 35 declaration, as commented in the recent decision of *Canada Post Corporation and RMS Pope Incorporated*, 2013 CIRB 672.

[56] There is also the highly questionable consequence of such a declaration on both CP and the GCRC that becoming a single employer of running trades persons only and only those operating on the segment between Kamloops and Calgary, a fraction of both the RM Train operations and personnel, would result in the passenger service component on-board the same route segment being

artificially segregated from the tourist train business of which it is an essential part. This would likely lead to unnecessary frictions between CP and the GCRC as they do not share a common interest in the RM Train business and to undue difficulties with and between employees affected who would partially be governed by CP collective agreements only if and when they work as running trades persons on the segment between Kamloops and Calgary. The applicant has not satisfied the Board that it should use its discretion to make the declaration in these circumstances, even if it had succeeded (which it has not) in establishing all the other required conditions enunciated at section 35 of the *Code*.

[57] Accordingly, the application is dismissed. This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Robert Monette
Member